

E-FILED: 10/28/2008

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	NO. CR 93-766-GHK
	)	
Plaintiff,	)	ORDER DENYING MOTION FOR
	)	NUNC PRO TUNC ORDER AND/OR
vs.	)	DENYING PETITION FOR WRIT
	)	OF HABEAS CORPUS
KIM MARHOLZ,	)	
	)	
Defendant.	)	
	)	

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This matter is before us on Defendant's Motion for "Nunc Pro Tunc Order From the Time of Federal Custody." We deemed this a petition for writ of habeas corpus. The government has filed an Opposition, and defendant has filed a Reply. We deem this matter ready for decision without oral argument. We rule as follows:

Defendant essentially seeks an order directing the Bureau of Prisons ("BOP") to grant certain custody credits to him because he claims that the BOP refuses to grant such credits without such order. We do not have authority to calculate credits. That authority lies with the Attorney General who acts through the BOP on such matters. *United States v. Wilson*, 503 U.S. 329, 333-34 (1992). The Ninth Circuit has interpreted *Wilson* to mean that district courts do not have authority to grant defendants credits for time spent in jail

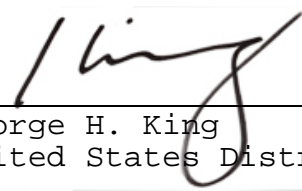
1 prior to commencement of their sentence. *United States v. Peters*, 470  
2 F.3d 907, 909 (9th Cir. 2006).

3 Inasmuch as we have no authority to calculate credits, and  
4 defendant appeared to claim that the BOP had refused to properly  
5 calculate his credits, defendant's motion seemed to be in the nature  
6 of a habeas petition challenging the execution of his sentence.  
7 Accordingly, we construed his motion as such habeas petition, and  
8 directed the Government to respond.<sup>1</sup> The Government's opposition  
9 states that defendant has failed to exhaust his administrative  
10 remedies. In his reply, defendant does not dispute that he has failed  
11 to exhaust his administrative remedies. Accordingly, defendant's  
12 motion, construed as a habeas petition, is denied without prejudice to  
13 its refiling after exhaustion of administrative remedies.

14 Accordingly, this Motion for Nunc Pro Tunc order is DENIED,  
15 and if construed as a petition for writ of habeas corpus, the petition  
16 is DENIED for failure to exhaust administrative remedies.

17 IT IS SO ORDERED.

18 DATED: OCTOBER 28, 2008

19  
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21 \_\_\_\_\_  
George H. King  
United States District Judge  
22  
23  
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25 <sup>1</sup>In his reply, defendant asserts, without citation to any  
26 authority, that we are powerless to construe his pro se motion as  
27 a habeas petition. Aside from the doubtful validity of such  
28 assertion, we note that this motion would be, and is, denied even  
if it were not construed as a habeas petition. If viewed as a  
motion for the court to calculate credits, it is denied because  
we lack authority to do so.